

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-R-17-313-E
: :
PEQUEA TOWNSHIP :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On November 2, 2017, the American Federation of State, County and Municipal Employees, District Council 89, AFL-CIO (AFSCME or Union) filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) seeking to represent a unit of all full-time and regular part-time nonprofessional, blue and white collar employes of Pequea Township (Township or Employer). On November 9, 2017, the Secretary of the Board issued an Order and Notice of Hearing, in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating February 5, 2018, in Harrisburg, as the time and place of hearing, if necessary. The hearing was continued to February 27, 2018 at the request of AFSCME and without objection from the Township.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board on February 27, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed timely post-hearing briefs in support of their respective positions on April 23, 2018.

The Examiner, on the basis of the testimony and exhibits presented at the hearing, and from all of the matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Township is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act (PERA or Act). (Joint Exhibit 1)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (Joint Exhibit 1)
3. The parties stipulated that the unit deemed appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time nonprofessional blue and white collar employes, and excluding all management level employes, supervisors, confidential employes, and guards as defined by the Act. (N.T. 8)
4. The parties stipulated that if the foreman is not found to be supervisory, the position shares an identifiable community of interest with the rest of the employes in the petitioned-for unit. (N.T. 8-9)
5. The parties stipulated that if the positions held by Donald Hall and Richard Jeffries are found to be regular part-time, those positions share

an identifiable community of interest with the rest of the employees in the petitioned-for unit. (N.T. 9)

6. Jeffrey Fry has been employed full-time as the foreman in the Township's road crew since May 2017. He began working for the Township in May 2013 and previously served as the Roadmaster from September 2016 to November 2016. (N.T. 14, 94, 126-127)

7. The road crew is responsible for patching potholes, replacing and repairing street and road signs, trimming trees, operating equipment, plowing snow, and replacing storm sewer pipe crossings on roads. Fry works alongside the other full-time and part-time road crew employees performing these duties. (N.T. 94-95, 106)

8. Fry estimated that during a typical 40-hour workweek, he spends approximately 20 to 30 hours working out in the field or in the shop. His shop work includes welding and servicing equipment by repairing lights and wiring. Fry spends the remainder of his time in the office, answering emails, taking Pennsylvania One calls, pricing materials, and getting materials together for projects.¹ (N.T. 96-98, 108)

9. Fry has no involvement in hiring or firing employees, layoff or promotion decisions, disciplining employees, formally evaluating employees, or approving their leave requests. Nor does he have input regarding employees' wages. (N.T. 37-38, 60, 76, 83-84, 103, 110-111, 132)

10. Fry does not create or implement Township policies, perform inspections for code violations, or prosecute building or zoning enforcement actions. (N.T. 37-38, 113)

11. Fry does not attend Board of Supervisors meetings or budget workshops. (N.T. 15, 102)

12. When Fry was the Roadmaster in 2016, he provided the Township Secretary with information about prices for equipment and parts for the road crew to help the Township Supervisors formulate its budget for the upcoming year. (N.T. 109)

13. Between November 15, 2017 and December 6, 2017, the Roadmaster and Township Secretary asked Fry to provide information about the cost of parts and materials for the road crew for the upcoming year. The road crew worked together to come up with a list of what was needed, and Fry priced out the materials, parts, and equipment, and passed along those figures to the Township Secretary and the Township Supervisors as requests for the upcoming year. The Roadmaster took responsibility for costing the outside contractor work. (N.T. 52, 100, 108, 112, 117, 119-120; Exhibit E-2, E-3)

14. The Roadmaster ultimately presented three budget proposals to the Township Supervisors that included the pricing Fry had done. The Township Supervisors did not accept any of those proposals, and instead one of the Supervisors came up with her own proposal. The Board of Supervisors has

¹ Fry described the Pennsylvania One calls as an organization, which receives calls from excavators and notifies facility owners if someone is working in a designated area, so that the providers may come out to the area to protect a gas or electric line. (N.T. 96-97).

rejected items that Fry requested when they are deemed too costly. (N.T. 17, 53)

15. Fry makes purchases for the Township and signs off on invoices, as do other members of the road crew, including Craig Mellinger and Brian Herr. For normal everyday purchases that are covered in the budget line items, Fry and other road crew members do not have to get Township approval. For major purchases or items that are not in the budget, Fry must get approval from the Township Supervisors. (N.T. 28-29, 40, 103-104)

16. The Township Secretary provides the road crew employes with a sheet of paper that lists the amounts of money budgeted for particular line items, which hangs in the office on a clipboard. When Fry makes purchases, he makes a note on the line item on the sheet. Fry tracks the majority of purchases in this fashion, except for signage orders, which are handled by Brian Herr. (N.T. 104-106)

17. Fry must get approval from the Board of Supervisors for any repairs, which the road crew employes cannot perform in-house and which require the use of an outside contractor that is beyond the Township's budget. (N.T. 102, 116)

18. Don Hall has been employed as a part-time public works laborer for the Township since 2014. (N.T. 12, 71)

19. Hall is responsible for mowing the road banks. Since 2014, he has worked from either April or May until sometime in October. At the start of the mowing season, the Roadmaster or foreman calls Hall to set up a start date for the year. After that, his specific hours vary depending on the weather, how fast the grass is growing, available daylight hours, and traffic. Typically, he works about three to three and a half days every two or three weeks, for seven and a half to eight hours a day. The only year he did not work until the end of the season was 2017 due to an injury. (N.T. 72, 74-76, 126; Union Exhibit 2)

20. In 2016, Hall worked hours in every pay period from April 17 until October 15. In 2015, Hall worked hours in every pay period from April 19 until October 17. In 2014, Hall worked hours in every pay period from May 18 until August 9, and then again from September 7 until November 1. (Union Exhibit 2)

21. If Hall is not able to work, a full-time member of the road crew does the Township's mowing. (N.T. 72)

22. When Hall is mowing, he works as part of a two-man crew, meaning that another member of the road crew follows behind him in a pick-up truck with signs displayed. (N.T. 72-73)

23. Hall reports to work at the Township building, just like the full-time employes, and notes his hours on a time sheet, which is kept on a clipboard there. (N.T. 73-74, 78)

24. Richard Jeffries has been employed as a part-time public works equipment operator/laborer for the Township since 1993. (N.T. 12, 79-80)

25. Jeffries works for the Township all year and is qualified to operate various types of equipment, such as the plow trucks, front-end

loaders, backhoes, and dump trucks, which is the same equipment the full-time employes use. (N.T. 80-82)

26. Jeffries is a certified flagger, meaning that he obtained a qualification through the state to direct traffic. The other three certified flaggers for the Township are all full-time employes. (N.T. 80-81)

27. Jeffries works alongside the full-time road crew employes of the Township, including the foreman. (N.T. 81-83)

28. Jeffries tracks his hours by filling out a time sheet, which is kept on a clipboard at the Township building, as do the full-time road crew employes. (N.T. 81-82)

29. Jeffries worked hours in 13 pay periods spread throughout 2017, which totaled approximately 317 hours for the year. (Employer Exhibit 1)

DISCUSSION

AFSCME has petitioned to represent a bargaining unit comprised of all full-time and regular part-time nonprofessional, blue and white collar employes of the Township. However, the Township contends that the position of foreman should be excluded from the unit as a supervisory and/or management level employe, while the positions held by Hall and Jeffries should be excluded as casual, and not regular part-time, under the Act. As the party seeking to exclude the positions from the unit, the Township has the burden of proving by substantial evidence the asserted statutory exclusions apply. Westmoreland County v. PLRB, 991 A.2d 976 (Pa. Cmwlth. 2010) *alloc. denied* 17 A.3d 1256 (Pa. 2011). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. *Id.* at 980.

Section 301(6) of PERA provides as follows:

“Supervisor” means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6).

In Abington Heights School District, 42 PPER 18 (Final Order, 2011), the Board quoted Luzerne County Community College, 37 PPER 47 (Final Order, 2006) and opined as follows:

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983). It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, “may take into consideration the extent to which

supervisory and nonsupervisory functions are performed.” 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employees who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 462 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 795 A.2d 984 (2000; State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532 (Pa. Cmwlth. 1980). Conversely, where the employee performs predominantly supervisory duties, that employee is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975).

As a result, the Board in Abington Heights School District, *supra*, went on to hold that, absent evidence an employee spends a majority of his or her time performing supervisory duties, this is not sufficient evidence to show that the position in question should be excluded as supervisory under Section 301(6) of PERA.

Here, the Township argues that the foreman position should be excluded from the unit because Fry assigns work to the other employees in the road crew. However, the record is devoid of any evidence to show that Fry exercises independent judgment or that the assignment of duties is anything other than routine or clerical in nature. Further, even assuming the assignment of duties supported a supervisory exclusion under Section 301(6) of the Act, the Township did not present any evidence to show that Fry spends a majority of his time performing this task. In fact, the record shows the opposite to be true, i.e. that Fry spends a majority of his time working alongside the other members of the road crew in the field or performing welding work and servicing equipment in the shop. Indeed, Fry testified credibly that he spends approximately 20 to 30 hours of his 40-hour week performing these functions. Similarly, the record does not show that Fry has ever hired, transferred, suspended, laid off, recalled, promoted, discharged, rewarded, or disciplined other employees, or effectively recommended such action. To the contrary, the record shows that Fry has no involvement in these job duties. As such, the foreman position will not be excluded from the bargaining unit as a supervisory employee pursuant to Section 301(6) of the Act.

Next, the Township argues that the foreman position should be excluded from the bargaining unit as a managerial employee under Section 301(16) of PERA. Once again, however, the Township has not proven the managerial exclusion for the foreman position.

Section 301(16) of PERA provides that:

“Management level employee” means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of supervision.

43 P.S. § 1101.301(16).

The Board has held that if employees meet only one part of the three-part test set forth in Section 301(16), then those employees are managerial. Pennsylvania Ass'n of State Mental Hospital Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1990). In Horsham Township, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), the Board stated:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

The remaining criteria for designating an employe as managerial concerns one "who responsibly directs the implementation (of policy)" and shall include "all employes above the first level of supervision." We interpret these criterion to include those persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task. The administration of a policy involves basically two functions: (1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy. Furthermore, the interpretation of policy would constitute responsible implementation of policy as a continuation of the managerial decision making process.

* * *

In City of Lebanon, 4 PPER 24 (1974), we stated that policy formulation and implementation must be distinguished from technical expertise. To define the problem and directly implement the proposed solution to a problem is not the same as performing a function within a known discipline with competence. The former has to do with policy and the latter deals with technical expertise.

The Commonwealth Court has opined that an employe's decisions are not managerial if they are part of the employe's routine discharge of professional duties. Municipal Employees of the Borough of Slippery Rock v. PLRB, 14 A.3d 189 (Pa. Cmwlth. 2011). Rather, in order to be considered a managerial level employe, the employe must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found. *Id.* at 192. The exercise of authority to take remedial action in the event of noncompliance with governmental regulations

is the hallmark of a management level employee. In the Matter of the Employees of Jefferson Morgan School District, 31 PPER ¶ 31115 (Proposed Order of Unit Clarification, 2000) citing School District of Philadelphia v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998).

In this case, the Township points to Fry's alleged involvement with the "development and implementation of [the Township's] budget," along with his authority to sign for invoices and approve services by third parties, as evidence of his managerial status under the Act. The record shows that when Fry was the Roadmaster in 2016, he provided the Township Secretary with information about prices for equipment and parts for the road crew to help the Township Supervisors formulate its budget for the upcoming year. However, this cannot be used to support an exclusion for the foreman position because Fry was not employed as the foreman during the fall months of 2016, but rather as the Roadmaster.

Nor does Fry's alleged involvement with the budget process in 2017 support a managerial exclusion under the Act. Between November 15, 2017 and December 6, 2017, the Roadmaster and Township Secretary asked Fry to provide information about the cost of parts and materials for the road crew for the upcoming year.² The road crew worked together to come up with a list of what was needed, and Fry priced out the materials, parts, and equipment, and passed along those figures to the Township Secretary and the Township Supervisors as requests for the upcoming year. The Roadmaster took responsibility for costing the outside contractor work. The Roadmaster ultimately presented three budget proposals to the Township Supervisors that included the pricing Fry had done. The Township Supervisors did not accept any of those proposals, and instead one of the Supervisors came up with her own proposal. The Board of Supervisors has rejected items that Fry requested when they are deemed too costly.

First of all, the Township Secretary, Lori Ann Leitch, readily conceded that she usually relies on the Roadmaster for the budget numbers and information and that this was not part of Fry's job duties as the foreman. (N.T. 27-28). This testimony is consistent with the Township's job description for the Roadmaster position, which states that the Roadmaster is "responsible for recommending, to the Board of Supervisors, the purchases of equipment and tools needed to maintain the Township roads and equipment," as well as the draft job description for the foreman position, which says nothing about the foreman having any budgetary responsibilities. (N.T. 34-35; Union Exhibit 1, 4). Indeed, the record shows that Fry does not even attend the Board of Supervisors meetings or budget workshops.

² Post-petition evidence is admissible where there has been no showing that the employer changed job duties merely to influence the Board's determination regarding the placement of the position in question. In the Matter of the Employees of Housing Authority of the City of Shamokin, 42 PPER 32 (Proposed Order of Unit Clarification and Proposed Order of Amendment of Certification, 2011) citing In the Matter of the Employees of Westmoreland County, 40 PPER 35 (Final Order, 2009). There is no indication that the post-petition evidence in this case, Fry's involvement with the 2017 budget process, was suspicious in any way or designed to influence these proceedings. Instead, it simply appears that the Township's Roadmaster, who was also serving as a Township Supervisor, was not able and available to provide the budget information himself and the Township was in a time crunch. (N.T. 27-28, 109, 112-113).

In any event, even assuming these duties are part of the foreman's regular responsibilities, they still do not establish that the foreman has meaningful participation in the formulation of the Township's budget. To the contrary, Fry's involvement in the budget process consists of little more than presenting estimates of the costs for foreseeable and projected road maintenance matters, and formulating recommendations for buying new equipment for the road crew, which the Board has deemed insufficient to satisfy the first prong of the managerial test under Section 301(16) of the Act. In the Matter of the Employes of Cumberland Township, 49 PPER 66 (Final Order, 2018). Indeed, the Board specifically equated such job duties to researching or collecting data necessary for the development of a road department budget proposal and possibly drafting proposed language for the budget without meaningful participation in the decisional process for the final Township budget approval, which has long been held to fall short of the managerial exclusion. *Id.* This was especially the case, given that the employe in question in Cumberland Township, like the foreman here, had given budget recommendations which were modified and rejected as presented.

Likewise, the foreman's authority to sign for invoices and approve services by third parties does not support a managerial exclusion under the Act. The record shows that Fry makes purchases for the Township and signs off on invoices, as do other members of the road crew, including Craig Mellinger and Brian Herr. For normal everyday purchases that are covered in the budget line items, Fry and other road crew members do not have to get Township approval. For major purchases or items that are not in the budget, Fry must get approval from the Township Supervisors. The Township Secretary provides the road crew employes with a sheet of paper that lists the amounts of money budgeted for particular line items, which hangs in the office on a clipboard. When Fry makes purchases, he makes a note on the line item on the sheet. Fry tracks the majority of purchases in this fashion, except for signage orders, which are handled by Brian Herr. Fry must get approval from the Board of Supervisors for any repairs, which the road crew employes cannot perform in-house and which require the use of an outside contractor that is beyond the Township's budget.

It is now well settled that mere purchasing authority is not implementation of the general budget for purposes of determining management level status under the second prong of Section 301(16) of PERA. Cumberland Township, supra, citing In the Matter of the Employes of East Mead Township, 47 PPER 46 (Order Directing Remand to the Examiner for Further Proceedings, 2015). Indeed, the Cumberland Township Board reiterated the rule that once a general budget has been adopted by a public employer, an employe's purchases in accordance with the budget are not implementation of budget policy under the second prong of the test. *Id.* The record here shows that Fry's authority to sign for invoices and/or approve services by third parties is limited to what is already covered in the budget and that he must obtain approval for major purchases or items that go beyond the particular line items. This is not enough to establish that the foreman is a manager. Accordingly, the foreman position will not be excluded from the bargaining unit as a managerial employe pursuant to Section 301(16) of PERA.³

Finally, the Township contends that the positions held by Hall and Jeffries are not regular part-time within the meaning of the Act, but rather casual employes who are not entitled to vote in the election. AFSCME, on the

³ The Township does not argue and the record does not show that the foreman is above the first level of supervision under the third prong of the test.

other hand, maintains that the positions are regular part-time employes, eligible to vote in the election. The Board has held that regular part-time status exists when an employe works on a recurring basis with a reasonable expectation of continued employment. Independence Township, 27 PPER ¶ 27108 (Order Directing Submission of Eligibility List, 1996) *citing* Community College of Philadelphia v. Commonwealth, 423 A.2d 637 (Pa. Cmwlth. 1981), *aff'd*, 437 A.2d 942 (Pa. 1982). However, part-time employes who work as a matter of special engagement with no reasonable expectation of continued employment are excluded from bargaining units as casual employes. *Id. citing* Erie County Area Vocational-Technical School v. PLRB, 417 A.2d 796 (Pa. Cmwlth. 1980).

The record shows that Hall has worked from either April or May until sometime in October since 2014, except for 2017 when he did not finish out the mowing season due to an injury. Although his hours vary depending on a number of factors, Hall worked hours in nearly every pay period during this time frame from 2014 through 2016. As such, it cannot be seriously contested that Hall works on a recurring basis with a reasonable expectation of continued employment. The same result must obtain with regard to Jeffries, who has worked for the Township all year round since 1993. Jeffries worked hours in 13 pay periods spread throughout 2017, which totaled approximately 317 hours for the year.⁴ This represents an average of approximately 24.3 hours or about three shifts for every other pay period, or 12.2 hours or about 1.5 shifts every pay period. As a result, it must be concluded that these positions satisfy the Board's definition of regular part-time status and must be included in the unit.

CONCLUSIONS

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Township is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The foreman position held by Fry is not supervisory or managerial, and is properly included in the bargaining unit.
5. The public works laborer position held by Hall is that of a regular part-time employe and properly included in the bargaining unit.
6. The public works equipment operator/laborer position held by Jeffries is that of a regular part-time employe and properly included in the bargaining unit.
7. The foreman, part-time public works laborer, and part-time public works equipment operator/laborer share an identifiable community of interest with the rest of the employes in the petitioned-for unit.

⁴ Again, the post-petition evidence is admissible because there has been no showing that Jeffries' hours in November and December 2017 were suspicious in any way or designed to influence this proceeding.

8. The unit appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time nonprofessional blue and white-collar employees, including but not limited to the foreman, public works equipment operator/laborer, and public works laborer, and excluding all management level employees, supervisors, first level supervisors, confidential employees, and guards as defined in the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Examiner

HEREBY ORDERS AND DIRECTS

that the Township shall within ten (10) days from the date hereof submit to the Board a current alphabetized list of the names and addresses of the employees eligible for inclusion in the unit set forth in Conclusion 8 above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this decision and order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b).

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this 17th day of May, 2018.

PENNSYLVANIA LABOR RELATION BOARD

John Pozniak, Hearing Examiner